No. 3957

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE E. MILLER,

Plaintiff in Error,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Names and Addresses of Attorneys of Record.

GEORGE D. AYERS, Ziegler Building, Spokane, Washington,

Attorney for Plaintiff, and Plaintiff in Error.

ALLEN, WINSTON & ALLEN, Paulson Building, Spokane, Washington,

Attorneys for Defendant, and Defendant in Error. [1*]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiff complains and alleges:

I.

That the Spokane International Railway Company, the above-named defendant, is now and was at all times herein mentioned a corporation, created,

*Page-number appearing at foot of page of original certified Transcript of Record.

organized and existing under and by virtue of the laws of the State of Washington, owning, operating and controlling an interstate line of railway within and between the States of Idaho and Washington, and engaged in interstate commerce as a common carrier.

II.

That at the time of the happening of the accident to plaintiff, hereinafter mentioned, he was in the employ of defendant as an engineer on one of its trains, being operated over its line of interstate railway, and hauling and transporting interstate freight and freight which had originated in whole or in part in the Dominion of Canada, and whose destination was some point in the United States.

III.

That immediately prior to the time of the happening of the accident to plaintiff, hereinafter mentioned, plaintiff, in the operation of said locomotive of defendant over said line of interstate railway had hauled to the Canadian line, that is, the line between the Dominion of Canada and the United States, a train of cars hauling interstate freight, and at the particular time of the accident said engine on which plaintiff was employed and was operating was on the main line of said defendant's railway, at the town of Eastport, Idaho, being at or near the said international line between said two countries, and was there awaiting the coming of another interstate train from Canada which was then being hauled and operated toward said point

where plaintiff and his engine were standing, the purpose of plaintiff waiting at said point on said line being that as soon as the said train of interstate cars would arrive, it became plaintiff's duty, in the operation of said engine, to couple on to said cars and to continue the interstate transportation and transportation between said Dominion of Canada and the United States of said interstate and international traffic.

IV.

That at the time of the happening of the accident hereinafter mentioned plaintiff was employed in interstate commerce by [3] the defendant in doing and performing necessary acts and things as an incident to and necessary to be done in assisting and aiding and performing the employment of the act of interstate commerce in which defendant was engaged.

V.

That while plaintiff was employed as aforesaid, and while the said locomotive was standing on said main line of defendant's railway, plaintiff, in the performance of his duty as an employee aforesaid, stepped upon a certain metal apron attached to the said locomotive and extending over and across the space between the locomotive and the tender, except at either end of said space, and while stepping upon said metallic apron plaintiff slipped upon said apron and fell through the space between the locomotive and the tender not covered by said apron, causing the injuries hereinafter complained of.

VI.

That the cause of plaintiff's fall and slipping on said apron was the fact that the defendant, in violation of the Federal Safety Appliance Act, and that certain act, and the Federal Locomotive Boilers Inspection Act of Congress of the United States known as the Federal Employers Liability Act, had negligently and carelessly failed to conform to the requirements of said safety appliance act, and the rules and regulations of the United States Interstate Commerce Commission and the laws, rules and instructions governing and controlling the application of the Federal Locomotive Boiler Inspection Law, and the requirements of said Interstate Commerce Commission with reference thereto called Rules and Instructions for Inspection and Testing of Steam Locomotives and Tenders as amended March 4, 1915, and particularly that part of the rules, regulations and requirements of said Interstate Commerce Commission designated as Section 117, which reads as follows:

> "Cab aprons.—Cab aprons shall be of proper length and width to insure safety. Aprons must be securely hinged, maintained in a safe and suitable condition for service, and roughened, or other provision made, to afford secure footing."

And rule 152(c) which reads as follows:

> (c) "The minimum width of the gangway between locomotive and tender, while stand-

ing on straight track, shall be sixteen (16) inches."

VII.

That defendant constructed and permitted to be used upon said locomotive an apron that was perfectly smooth, was not maintained in a suitable and safe condition for use, was not roughened or otherwise made to afford secure footing, and that along that side of said apron next the tender there was attached thereto and forming a part of thereof a metallic strip approximately four inches in width extending the full length of said apron, which extension never had been roughened and was not roughened in any way at the time of said accident, but was perfectly smooth at said time; that said apron was approximately nine (9) inches too short at each end to insure safety, thus leaving a hole between the front tender sill and tail piece on the locomotive thirteen (13) inches wide by sixteen (16) inches long; that, by reason of said hole there were only approximately eight and one-half (8½) inches in width of standing space at the gangway between the cistern on [4] said tender and said hole at or in the vicinity of the place where plaintiff slipped as aforesaid, thus making an extremely narrow and dangerous standing place or passage way between said cistern and the said hole.

VIII.

That said accident occurred to plaintiff about 5:40 P. M. on the 28th day of July, 1919; that said locomotive was for a long time prior to said acci-

dent commonly used and employed on said interstate line of railway with the apron hereinafter described, constructed and maintained in the manner and form hereinbefore pleaded.

IX.

That as a contributing cause to plaintiff's slipping on said apron, the defendant negligently and carelessly so constructed the slack adjustment between the locomotive and the tender that it so interfered with said apron that it did not fit smoothly, or was not on a level with the floor of said tender, as a result of which said apron extended upward from the floor of said tender a distance of about an inch and a half, which fact plaintiff was not advised of and did not realize until after said accident, and as he stepped backward upon said apron and near the edge closer to the tender, his foot in some manner caught in said apron, or on the edge thereof, on account of said space between the top of said apron and the floor of said tender, causing him to slip on said smooth surface of said apron.

X.

That by reason of plaintiff's slipping on said apron on or near to said narrow space aforesaid, plaintiff was caused to fall through said hole down and out of said cab and locomotive on to the ground below, thus causing the injuries hereinafter mentioned. That in falling out of said cab and locomotive, as hereinbefore pleaded, plaintiff's right elbow and the joint thereof were greatly injured, bruised, wrenched and strained, and the right elbow

joint fractured by what is known as a T-shaped comminuted fracture of the lower end of the humerus, and which greatly involved the elbow joint, causing extreme and excruciating pain and suffering, ever since the time of said injury, and greatly limiting and impairing the use of said arm, and especially the elbow joint, and rendering it impossible for plaintiff to perform the duties of locomotive engineer, in which he had been engaged for a great many years, and the only occupation with which plaintiff is familiar. That plaintiff's earning power and ability have been greatly impaired, and will continue to be greatly impaired during the balance of his life.

XI.

That at the time of said accident plaintiff was earning and capable of earning wages to the amount of $275.00 to $325.00 per month, and was constantly employed; that he was in perfect health; that at all times since said accident he has been unable to perform any labor or earn any money, which has caused him a specific loss in wages, up to the time of the commencement of this action, in the sum of $7,200.00.

XII.

That by reason of said accident the plaintiff was compelled [5] to and did undergo a surgical operation and manipulation and working over by said doctors for the purpose of attempting to get motion in said elbow, all of which caused plaintiff extreme and excruciating suffering constantly, and plaintiff still suffers extreme pain from said in-

jury, and is informed and believes, and therefore states, that he will continue to suffer said pain for the balance of his natural life.

XIII.

That said injuries are permanent and plaintiff will never be able again to perform the duties which he had performed heretofore or earn the money which he had theretofore earned and was able heretofore to earn, and he has become a permanent cripple, and his whole physical system has been greatly shocked by the pain and suffering endured on account of said injury, all of which will be permanent.

XIV.

That by reason of the facts hereinbefore alleged, and the negligence and carelessness of defendant, plaintiff is and has been damaged in the sum of Forty Thousand Dollars ($40,000) no part of which has been paid.

WHEREFORE, plaintiff prays for judgment against defendant in the sum of Forty Thousand Dollars ($40,000) and his costs and disbursements, and for general relief.

GEORGE D. AYERS,
Attorney for Plaintiff, 514 Ziegler Building, Spokane, Washington.

State of Washington,
County of Spokane,—ss.

George E. Miller, being first duly sworn, on oath says that he is the plaintiff within named, that he has read the foregoing complaint, knows the con-

tents thereof, and that the same is true as he verily believes.

GEO. E. MILLER.

Subscribed and sworn to before me this 27th day of July, 1921.

JAMES T. HALL,

Notary Public, Residing at Spokane, Washington.

Filed in the U. S. District Court, Eastern District of Washington. Jul. 27, 1921. Wm. H. Hare, Clerk. H. J. Dunham, Deputy. [6]

United States of America in the District Court of the United States, Eastern District of Washington, Northern Division.

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court in the City of Spokane.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY CO., a Corporation,

Defendant.

Summons.

GEO. D. AYERS,

Plaintiff's Attorney.

The President of the United States of America, GREETING to Spokane International Railway Co., a Corporation:

You are hereby summoned to appear in the Dis-

trict Court of the United States, for the Eastern District of Washington, Northern Division, holding terms at the City of Spokane, within twenty days after service of this summons, exclusive of the day service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint, now on file in the office of the clerk of said court, a copy of which is herewith served upon you.

WITNESS the Honorable FRANK H. RUDKIN, Judge of the United States District Court for the Eastern District of Washington, and the seal of said District Court this 27th day of July, 1921.

W. H. HARE,
Clerk.

By ————————————,
Deputy Clerk.

United States of America,
Eastern District of Washington,—ss.

I hereby certify and return that I have personally served the within summons, together with the complaint in the within-entitled action, upon the within-named defendant by delivering to and leaving a true copy of the said summons and complaint with The Spokane & International Railway Co., by serving A. T. Harrick, as secretary of said Spokane & International Ry. Co., at Spokane, Wash.

J. E. McGOVERN,
United States Marshal.
By J. W. Dennison,
Deputy.

July 27, 1921.

Fees: $2.06.

[Endorsed]: No. 3716. U. S. District Court, Eastern District of Washington. George E. Miller vs. Spokane International Railway Company. Summons. Filed in the U. S. District Court, Eastern District of Washington. Jul. 23, 1921. W. H. Hare, Clerk. [7]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Answer.

The defendant for answer to plaintiff's complaint alleges and says:

1. It admits the allegations of paragraph one thereof.

2. It admits that at the time of the happening of the accident to plaintiff, described in the complaint herein, the plaintiff was in defendant's employ as an engineer on one of its trains, and it denies each and every other allegation in paragraph two thereof.

3. It denies each and every allegation of paragraphs three, four and five thereof.

4. It admits that under the provisions of the Federal Locomotive Boiler Inspection Act of Congress of the United States, the Interstate Commerce Commission of the United States has attempted to make certain regulations known as section 117 which reads as set forth in the complaint herein and Rule 152 C, which reads as set forth in the complaint herein, and it denies each and every other allegation in paragraph six of said complaint.

5. It admits that an accident happened to plaintiff at about five-forty P. M., on the 28th day of July, 1919, and it denies each and every other allegation in paragraph eight of said complaint contained.

6. It denies each and every allegation of paragraph nine of said complaint. [8]

7. It denies each and every allegation of paragraph ten, eleven, twelve, thirteen and fourteen of said complaint.

And for a first, further and affirmative answer and defense, defendant alleges:

1. That if the plaintiff was injured at the time and place set forth in the complaint herein, the said injuries were occasioned by his negligence and his negligence contributed proximately thereto.

And for a second, further and affirmative answer and defense, defendant alleges:

1. That if plaintiff was injured at the time and place set forth in the complaint herein, his injuries

were caused by the ordinary risk of said employment and he assumed said risk.

And for a third, further and affirmative answer and defense, defendant alleges:

1. That heretofore, on to wit: the 11th day of January, 1921, the plaintiff herein instituted an action in the above-entitled court against the defendant herein, being cause #3716 and filed in this court and cause to be served upon the defendant, a complaint, a true and correct copy of which is hereto attached, marked Exhibit "A" and made a part hereof.

2. That thereafter such proceedings were had in said cause that on the 2d day of April, 1921, the defendant caused to be filed and served herein, an answer, a true and correct copy of which in words, letters and figures is hereto attached, marked Exhibit "B" and made a part hereof.

3. That thereafter such proceedings were had in said cause that the same came on for trial in this court before the Honorable Frank H. Rudkin, Judge presiding with a jury and evidence was received from plaintiff in support of the allegations of his complaint and from defendant in support of the allegations of its answer and thereafter, the jury in said cause, on the 27th day of April, 1921, rendered its verdict in favor of the defendant. [9]

4. That thereafter, on the 4th day of May, 1921, a judgment was duly rendered and entered in the above-entitled cause in the above-entitled court wherein and whereby it was adjudged that plain-

tiff take nothing by his said action, that the same be dismissed, that the defendant go hence without day, and recover of plaintiff its costs, which said judgment has never been vacated, modified or appealed from.

5. That thereafter on the 15th day of June, 1921, the plaintiff filed and served in this cause a motion for a new trial of same and thereafter, on the 20th day of January, 1922, by order of this Court, the said motion for a new trial was denied.

6. That on the 27th day of July, 1921, this action was instituted.

7. That the said accident described and set forth in the complaint herein is the same accident described and set forth in the former action brought by plaintiff being cause #3545 aforesaid.

WHEREFORE, defendant prays judgment that plaintiff take nothing by this action; that the same be dismissed, that defendant go hence without day and recover of plaintiff its costs herein.

ALLEN, WINSTON & ALLEN,
Attorneys for Defendant.

State of Washington
County of Spokane,—ss.

A. T. Herrick, being first duly sworn on oath deposes and says that he is the assistant secretary of the defendant corporation herein and as such makes this verification; that he has read the foregoing answer, knows the contents thereof and that the same are true as he verily believes.

A. T. HERRICK.

Subscribed and sworn to before me this 24th day of January, 1922.

F. D. ALLEN,

Notary Public for Washington, Residing at Spokane.

Rec'd copy.

GEORGE D. AYERS,
Atty. for Plf.

Jan. 28, 1922. [10]

Exhibit "A."

United States of America in the District Court of the United States for the Eastern District of Washington, Northern Division.

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court in the City of Spokane.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

TURNER, NUZUM & NUZUM,
Plaintiff's Attorney.

The President of the United States of America, GREETING To Spokane International Railway Company, a corporation.

YOU ARE HEREBY SUMMONED to appear in the District Court of the United States for the

Eastern District of Washington, Northern Division, holding terms at the city of Spokane, within twenty days after the service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint now on file in the office of the clerk of said court, a copy of which complaint is herewith served upon you.

WITNESS the Honorable FRANK H. RUDKIN, Judge of the United States District Court for the Eastern District of Washington and the seal of said District Courf this 11th day of January, 1921.

W. H. HARE,
Clerk.

By ——————————,
Deputy Clerk. [11]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. ——.

GEORGE E. MILLER,
Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,
Defendant.

COMPLAINT.

Plaintiff complains and alleges:

I.

That the Spokane International Railway Company, the above-named defendant, is now and was at all times herein mentioned a corporation, created organized and existing under and by virtue of the laws of the State of Washington, owning, operating and controlling an interstate line of railway within and between the states of Idaho and Washington, and engaged in interstate commerce as a common carrier.

II.

That at the time of the happening of the accident to plaintiff, hereinafter mentioned, he was in the employ of defendant as an engineer on one of its trains, being operated over its line of interstate railway, and hauling and transporting interstate freight and freight which had originated in whole or in part in the Dominion of Canada and whose destination was some point in the United States.

III.

That immediately prior to the time of the happening of the accident to plaintiff, hereinafter mentioned, plaintiff in the operation of said locomotive of defendant over said line of interstate railway had hauled to the Canadian line, that is, the line [12] between the Dominion of Canada and the United States, a train of cars hauling interstate freight, and at the particular time of the accident said engine on which plaintiff was employed and

was operating was on the main line of said defendant's railway at the town of Eastport, Idaho, being at or near the said international line between said two countries, and was there awaiting the coming of another interstate train from Canada which was then being hauled and operated toward said point where plaintiff and his engine were standing, the purpose of the plaintiff waiting at said point on said line being that as soon as the said train of interstate cars would arrive, it became plaintiff's duty, in the operation of said engine, to couple on to said cars and to continue the interstate transportation and transportation between said Dominion of Canada and the United States of said interstate and international traffic.

IV.

That at the time of the happening of the accident hereinafter mentioned, plaintiff was employed in interstate commerce by the defendant in doing and performing necessary acts and things as an incident to and necessary to be done in assisting and aiding and performing the employment of the act of interstate commerce in which defendant was engaged.

V.

That while plaintiff was employed as aforesaid, and while the said locomotive was standing on said main line of defendant's railway, plaintiff, in the performance of his duty as an employee aforesaid, stepped upon a certain metal apron attached to the said locomotive and extending over and across the space between the locomotive and tender, and while stepping upon said metallic apron plaintiff

slipped and fell, causing the injuries hereinafter complained of. [13]

VI.

That the cause of plaintiff's fall and slipping on said apron was the fact that the defendant, in violation of the Federal Safety Appliance Act and that certain act of Congress of the United States known as the Federal Employers Liability Act, had negligently and carelessly failed to conform to the requirements of said safety appliance act, and the rules and regulations of the United States Interstate Commerce Commission and the laws, rules and instructions governing and controlling the application of the Federal Locomotive Boiler Inspection Law and the requirements of said Interstate Commerce Commission with reference thereto, as amended March 4, 1915, and particularly that part of the rules, regulations and requirements of said Interstate Commerce Commission designated as Section 117, which reads as follows:

> "Cab aprons.—Cab aprons shall be of proper length and width to insure safety. Aprons must be securely hinged, maintained in a safe and suitable condition for service, and roughened, or other provision made, to afford secure footing."

VII.

That defendant constructed and permitted to be used upon said locomotive an apron that was perfectly smooth, was not maintained in a suitable and safe condition for use, was not roughened or otherwise made to afford secure footing.

VIII.

That said accident occurred to plaintiff about 5:40 P. M. on the 28th day of July, 1919; that said locomotive was for a long time prior to said accident commonly used and employed on said interstate line of railway with the apron hereinafter described, constructed and maintained in the manner and form hereinbefore pleaded.

IX.

That as a contributing cause to plaintiff's slipping on said apron the defendant negligently and carelessly so constructed said [14] apron that it did not fit smoothly or was not on a level with the floor of said tender, as a result of which said apron extended upward from the floor of said tender a distance of about an inch or an inch and a half which fact plaintiff was not advised of, and did not realize until after said accident, and as he stepped backward upon said apron and near the edge closer to the tender, his foot in some manner caught in said apron, or on the edge thereof, on account of said space between the top of said apron and the floor of said tender, causing him to slip on said smooth surface of said apron.

X.

That by reason of plaintiff's slipping on said apron the same caused him to fall down and out of said cab and locomotive on to the ground below, causing the injuries hereinafter mentioned. That in falling out of said cab and locomotive, as hereinbefore pleaded, plaintiff's right elbow and the joint thereof were greatly injured, bruised,

wrenched and strained and the right elbow joint fractured by what is known as a T-shaped comminuted fracture of the lower end of the humerus and which greatly involved the elbow joint, causing extreme and excruciating pain and suffering, ever since the time of said injury and greatly limiting and impairing the use of said arm and especially the elbow joint, and rendering it impossible for plaintiff to perform the duties of locomotive engineer, in which he has been engaged for a great many years and the only occupation with which plaintiff is familiar. That plaintiff's earning power and ability have been greatly impaired and will continue to be greatly impaired during the balance of his life.

XI.

That at the time of said accident plaintiff was earning and capable of earning wages to the amount of $275.00 to $325.00 per month and was constantly employed; that he was in perfect health; that at all times since said accident he has been unable to perform any labor or earn any money which has caused him a specific loss in [15] wages, up to the time of the commencement of this action, in the sum of $5,671.75.

XII.

That by reason of said accident the plaintiff was compelled to and did undergo a surgical operation and manipulation and working over by said doctors for the purpose of attempting to get motion in said elbow, all of which caused plaintiff extreme and excruciating suffering constantly, and plaintiff still

suffers extreme pain from said injury and is informed and believes and therefore states that he will continue to suffer said pain for the balance of his natural life.

XIII.

That said injuries are permanent and plaintiff will never be able again to perform the duties which he had performed heretofore or earn the money which he had theretofore earned and was able heretofore to earn, and he has become a permanent cripple, and his whole physical system has been greatly shocked by the pain and suffering endured on account of said injury all of which will be permanent.

XIV.

That by reason of the facts hereinbefore alleged and the negligence and carelessness of defendant, plaintiff is and has been damaged in the sum of Twenty-five Thousand Dollars ($25,000.00), no part of which has been paid.

WHEREFORE, plaintiff prays for judgment against defendant in the sum of $25,000.00 and his costs and disbursements and for general relief.

TURNER, NUZUM & NUZUM,
W. H. PLUMMER,
Attorneys for Plaintiff.

State of Washington,
County of Spokane,—ss.

George E. Miller being first duly sworn, on oath states that he is the plaintiff in the above-entitled cause; that he has heard the foregoing complaint,

knows the contents thereof and believes the same to be true.

GEORGE E. MILLER.

Subscribed and sworn to before me this 11th day of January, 1921.

F. E. COFFEEN,

Notary Public for Washington, Residing at Spokane. [16]

Exhibit "B."

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. ——.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

ANSWER.

The defendant for answer to plaintiff's complaint alleges and says:

1. It admits the allegations of paragraph one thereof.

2. It admits that at the time of the happening of the accident to the plaintiff described in the complaint herein, plaintiff was in defendant's employ

as an engineer on one of its trains, and it denies each and every other allegation in paragraph two thereof.

3. It denies each and every allegation of paragraphs three, four and five thereof.

4. It admits that under the provisions of Federal Locomotive Boiler Inspection Acts, the Interstate Commerce Commission has attempted to make a certain regulation known as Section 117, in the language set forth in paragraph six and it denies each and every other allegation in said paragraph.

5. It denies each and every allegation in paragraph seven thereof.

6. It denies each and every allegation in paragraphs eight and nine thereof.

7. It denies each and every allegation in paragraph ten to sixteen thereof inclusive. [17]

And for a first, further, affirmative answer and defense, defendant alleges:

1. That if the plaintiff was injured at the time and place set forth in the complaint herein, said injuries were occasioned by his neglect and his neglect contributed proximately thereto.

And for a second, further, affirmative answer and defense, defendant alleges:

That if plaintiff was injured at the time and place set forth in the complaint herein, his injuries were caused by the ordinary risks of his said employment and he assumed the said risk.

WHEREFORE, defendant prays judgment that plaintiff take nothing by this action; that defend-

ant go hence without day and recover of plaintiff its costs herein.

ALLEN, WINSTON & ALLEN,
Attorneys for Defendant.

State of Washington,
County of Spokane,—ss.

A. T. Herrick being duly sworn, on oath says: That he is the assistant secretary of above-named defendant company, a corporation and that he makes this verification on behalf of said corporation; that he has read the foregoing answer and knows the contents thereof and that the same are true.

A. T. HERRICK.

Subscribed and sworn to before me this 16 day of April, 1921.

FRANK V. DuBOIS,
Notary Public for State of Washington, Residing at Spokane.

Filed in the U. S. District Court, Eastern District of Washington. Jan. 28, 1922. Wm. H. Hare, Clerk. Eva M. Hardin, Deputy. [18]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Reply.

Comes now the plaintiff in the above-entitled action and for reply to defendant's answer herein admits, denies and alleges as follows:

I.

As to defendants' first, further and affirmative answer and defence plaintiff denies each and every allegation thereof.

II.

As to defendants' second, further affirmative answer and defence, plaintiff denies each and every allegation thereof.

III.

As to defendants' third, further and affirmative answer and defence,

1. Plaintiff admits the first paragraph thereof except as to the number of said former action and says that the number of said former action is 3545.

2. Plaintiff admits the second paragraph thereof.
3. Plaintiff admits the third paragraph thereof.
4. Plaintiff admits the fourth paragraph thereof.
5. Plaintiff admits the fifth paragraph thereof.
6. Plaintiff admits the sixth paragraph thereof.
7. Plaintiff admits that the falling out of the cab and locomotive and the physical injury, pain and suffering, the loss of employment, and the permanent impairment of plaintiff's earning power and ability resulting therefrom are the same as those referred to in plaintiff's former complaint mentioned in defendants' third affirmative defence, but also alleges that the negligence on the part [19] of the defendant and the present cause of action based thereon are not the same as those set forth in his said former complaint, and denies each and every other allegation in said paragraph seven of defendants' third affirmative defense.

WHEREFORE plaintiff renews the prayer of his complaint.

GEORGE D. AYERS,
Attorney for the Plaintiff.

State of Washington,
County of Spokane,—ss.

George E. Miller, having first been duly sworn, on oath says: That he is the plaintiff named in the above-entitled action, that he has read the foregoing reply, knows the contents thereof, and that the same is true, as he verily believes.

GEO E. MILLER.

Subscribed and sworn to before me this 16th day of February, 1922.

JAMES T. HALL,
Notary Public of the State of Washington, residing at Spokane, Washington.

Rec'd copy of this reply, Feby. 17th, 1922.

ALLEN, WINSTON & ALLEN,
Attys. for Deft.

Filed in the U. S. District Court, Eastern District of Washington. Feb. 17, 1922. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [20]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3716.

GEORGE E. MILLER,
Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,
Defendant.

Motion.

The defendant moves the Court for an order dismissing this action with prejudice and with costs, for the reason and upon the ground that it appears affirmatively from the complaint, answer and reply herein that by the judgment of this Court in cause #3545 plaintiff was adjudged to be not entitled to

recover of and from the defendant, damages for injuries sustained in the accident referred to in the complaint herein and therefore, said judgment is a bar to this action. The matters and things set forth in the complaint herein have been formerly adjudicated against plaintiff and plaintiff is estopped to maintain this action.

This motion is based on the files, records and proceedings herein.

ALLEN, WINSTON & ALLEN,
Attorneys for Defendant.

Received copy Feby. 25, 1922.

GEORGE D. AYERS,
Attorney for Plaintiff.

Filed in the U. S. District Court, Eastern District of Washington. Feb. 25, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [21]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Motion to Amend Complaint.

Comes now the plaintiff and moves to amend his complaint—

(a) By striking out of Paragraph VII thereof all of the language thereof beginning with the words "perfectly smooth" in line 51 and ending with the words "that said apron was" in line 59 thereof, so that the whole of said paragraph VII as amended shall read as follows:

"That defendant constructed and permitted to be used upon said locomotive an apron that was approximately nine (9) inches too short at each end to insure safety, thus leaving a hole between the front tender sill and tail piece on the locomotive thirteen (13) inches wide by sixteen (16) inches long; that by reason of said hole there were only approximately eight and one-half (8½) inches in width of standing space at the gangway between the cistern on said tender and said hole at or in the vicinity of the place where plaintiff slipped as aforesaid, thus making an extremely narrow and dangerous standing place or passage way between said cistern and the said hole."

(b) By striking out the whole of paragraph IX.

(c) By numbering the remaining paragraphs of said complaint as IX to XIII inclusive consequently instead of X to XIV inclusive consecutively as in said unamended complaint.

Received copy 3/22/22.

ALLEN, WINSTON & ALLEN.

By His Attorney,

GEORGE D. AYERS.

Filed in the U. S. District Court, Eastern District of Washington. Mar. 22, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [22]

September, 1921, Term. 118th day.

Monday, March 27, 1922.

Court met pursuant to adjournment at 10 A. M. Present: Honorable FRANK H. RUDKIN, F. R. JEFFREY, U. S. Dist. Attorney, A. F. KEES, U. S. Marshal, J. HAMILL, Crier, H. E. WEBB and C. H. CUMMINGS, Bailiffs, and ALAN G. PAINE, Clerk.

PROCEEDINGS:

* * * * * * * * *

3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY,

Defendant.

Minutes of Court—March 27, 1922—Order Granting Motion to Amend Complaint.

* * * * * * * * *

And thereupon court adjourned until to-morrow.

FRANK H. RUDKIN,

Judge. [23]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Amended Complaint.

Plaintiff complains and alleges:

I.

That the Spokane International Railway Company, the above-named defendant, is now and was at all times herein mentioned, a corporation, created, organized and existing under and by virtue of the laws of the State of Washington, owning, operating and controlling an interstate line of railway within and between the States of Idaho and Washington, and engaged in interstate commerce as a common carrier.

II.

That at the time of the happening of the accident to plaintiff, hereinafter mentioned, he was in the employ of defendant as an engineer on one of its trains, being operated over its line of interstate railway, and hauling and transporting interstate freight and freight which had originated in whole

or in part in the Dominion of Canada, and whose destination was some point in the United States.

III.

That immediately prior to the time of the happening of the accident to plaintiff, hereinafter mentioned, plaintiff, in the operation of said locomotive of defendant over said line of interstate railway had hauled to the Canadian line, that is, the line between the Dominion of Canada and the United States, a train of cars hauling interstate freight, and at the particular time of the accident said engine on which plaintiff was employed and was operating was on the main line of said defendant's railway, at the town of Eastport, Idaho, being at or near the said international line between said two countries, and was there awaiting the coming of another interstate train from Canada which was then being hauled and operated toward said point where plaintiff and his engine were standing, the purpose of plaintiff waiting at said point on said line being that as soon as the said train of interstate cars would arrive, it became plaintiff's duty, in the operation of said engine to couple on to said cars and to continue the interstate transportation and transportation between said Dominion of Canada and the United States of said interstate and international traffic. [24]

IV.

That at the time of the happening of the accident hereinafter mentioned, plaintiff was employed in interstate commerce by the defendant in doing and performing necessary acts and things as an incident

to and necessary to be done in assisting and aiding and performing the employment of the act of interstate commerce in which defendant was engaged.

V.

That while plaintiff was employed as aforesaid, and while the said locomotive was standing on said main line of defendant's railway, plaintiff, in the performance of his duty as an employee aforesaid, stepped upon a certain metal apron attached to the said locomotive and extending over and across the space between the locomotive and the tender, except at either end of said space, and while stepping upon said metallic apron plaintiff slipped upon said apron and fell through the space between the locomotive and the tender not covered by said apron, causing the injuries hereinafter complained of.

VI.

That the cause of plaintiff's fall and slipping on said apron was the fact that the defendant, in violation of the Federal Safety Appliance Act, and that certain act, and the Federal Locomotive Boilers Inspection Act, of Congress of the United States known as the Federal Employers Liability Act, had negligently and carelessly failed to conform to the requirements of said safety appliance act, and the rules and regulations of the United States Interstate Commerce Commission and the laws, rules and instructions governing and controlling the application of the Federal Locomotive Boiler Inspection Law, and the requirements of said Interstate Commerce Commission with reference thereto

called Rules and Instructions for Inspection and Testing of Steam Locomotives and Tenders as amended March 4, 1915, and particularly that part of the rules, regulations and requirements of said Interstate Commerce Commission designated as Section 117, which reads as follows:

> "Cab aprons.—Cab aprons shall be of proper length and width to insure safety. Aprons must be securely hinged, maintained in a safe and suitable condition for service, and roughened, or other provisions made, to afford secure footing."

And rule 152–C, which reads as follows:

> (c) "The minimum width of the gangway between locomotive and tender, while standing on straight track, shall be sixteen (16) inches."

VII.

That defendant constructed and permitted to be used upon said locomotive an apron that was approximately nine (9) inches too short at each end to insure safety, thus leaving a hole between the front tender sill and tail piece on the locomotive thirteen (13) inches wide by sixteen (16) inches long; that, by reason of said hole there were only approximately eight and one-half (8½) inches in width of standing space at the gangway between the cistern on said tender and said hole at or in the vicinity of the place where plaintiff slipped as aforesaid, thus making an extremely narrow and dangerous standing place or passageway between said cistern and the said hole. [25]

VIII.

That said accident occurred to plaintiff about 5:40 P. M. on the 28th day of July, 1919; that said locomotive was for a long time prior to said accident commonly used and employed on said interstate line of railway with the apron hereinafter described, constructed and maintained in the manner and form hereinbefore pleaded.

IX.

That by reason of plaintiff's slipping on said apron on or near to said narrow space aforesaid, plaintiff was caused to fall through said hole down and out of said cab and locomotive on to the ground below, thus causing the injuries hereinafter mentioned. That in falling out of said cab and locomotive, as hereinbefore pleaded, plaintiff's right elbow and the joint thereof were greatly injured, bruised, wrenched, and strained, and the right elbow joint fractured by what is known as a T-shaped comminuted fracture of the lower end of the humerus, and which greatly involved the elbow joint, causing extreme and excruciating pain and suffering, ever since the time of said injury, and greatly limiting and impairing the use of said arm, and especially the elbow joint, and rendering it impossible for plaintiff to perform the duties of locomotive engineer, in which he had been engaged for a great many years, and the only occupation with which plaintiff is familiar. That plaintiff's earning power and ability have been greatly impaired, and will continue to be greatly impaired during the balance of his life.

X.

That at the time of said accident, plaintiff was earning and capable of earning wages to the amount of $275.00 to $325.00 per month, and was constantly employed; that he was in perfect health; that at all times since said accident he has been unable to perform any labor or earn any money which has caused him a specific loss in wages, up to the time of the commencement of this action in the sum of Seventy-two Hundred Dollars ($7,200.00).

XI.

That by reason of said accident the plaintiff was compelled to and did undergo a surgical operation and manipulation and working over by said doctors for the purpose of attempting to get motion in said elbow, all of which caused plaintiff extreme and excruciating suffering constantly, and plaintiff still suffers extreme pain from said injury, and is informed and believes, and therefore states, that he will continue to suffer said pain for the balance of his natural life.

XII.

That said injuries are permanent and plaintiff will never be able again to perform the duties which he has performed heretofore or earn the money which he had theretofore earned and was able heretofore to earn, and he has become a permanent cripple, and his whole physical system has been greatly shocked by the pain and suffering endured on account of said injury, all of which will be permanent.

XIII.

That by reason of the facts hereinbefore alleged, and the negligence and carelessness of defendant, plaintiff is and has been [26] damaged in the sum of Forty Thousand Dollars ($40,000), no part of which has been paid.

WHEREFORE plaintiff prays for judgment against defendant in the sum of Forty Thousand Dollars ($40,000) and his costs and disbursements, and for general relief.

GEORGE D. AYERS,

Attorney for Plaintiff, 514 Ziegler Building, Spokane, Washington.

State of Washington,
County of Spokane,—ss.

George E. Miller being first duly sworn on oath says: that he is the plaintiff within named, that he has read the foregoing complaint, knows the contents thereof, and that the same is true as he verily believes.

GEO. E. MILLER.

Subscribed and sworn to before me this 21st day of March, 1922.

JAMES T. HALL,

Notary Public Residing at Spokane, Wash.

Rec'd copy of above this 22d day of Mch., 1922.

ALLEN, WINSTON & ALLEN,

Attorneys for Deft.

Filed in the U. S. District Court, Eastern District of Washington. Mar. 27, 1922. Alan G. Paine, Clerk. [27]

United States District Court for the Eastern District of Washington.

No. 3716.

GEORGE E. MILLER

vs.

SPOKANE INTERNATIONAL RAILWAY CO.

Appearance of Attorneys for Defendant.

To the Clerk of the Above-entitled Court:

You will please enter my appearance as attorney for defendant in the above-entitled cause, and service of all subsequent papers, except writs and process, may be made upon said defendant, by leaving same with Allen, Winston & Allen, post-office address, Paulsen Building, Spokane, Wash., attorneys for defendant.

Notice—Attorneys will please endorse their own filings.

[Endorsed]: No. 3716. United States U. S. Dist. Court, Eastern District of Washington. George E. Miller vs. Spokane International Ry. Appearance. Filed in the U. S. District Court, Eastern Dist. of Washington. April 17, 1922. Alan G. Paine, Clerk. Eva M. Hardin, Deputy Clerk. Alex M. Winston, for Defendant. [27½]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Plaintiff's Brief on Defendant's Motion to Dismiss.

In order not to stand upon technicalities, plaintiff without inquiry as to procedure, expressly waives any objection that may exist to defendant raising the question as to *res adjudicata* and as to splitting of actions at this stage of proceedings on motion to dismiss.

For the same reason, plaintiff agrees that, although his amended complaint was filed *after* the motion to dismiss (which technically might be said to apply only to the complaint before amendment) nevertheless defendant's motion to dismiss, as well as the present filed answer to the unamended complaint and plaintiff's reply thereto may, if defendant so chooses, stand as if filed *after* the filing of the amended complaint.

Plaintiff, however, calls attention to the fact that every allegation of specific acts either of negligence or of violation of the Federal Law that could

have been raised in the former action of Miller vs. Spokane International Railway Company, No. 3545 has been eliminated in the amended complaint, so that the question is squarely raised before this Honorable Court whether the fact that the injuries suffered by the plaintiff, evidence of which was introduced in the former trial *upon the question of damages,* being the same injuries in part at least upon which evidence will be introduced in the instant case, when it comes to trial, is a bar to the trial of the instant case. [28]

Plaintiff does not deny that the suffering of "injuries" in the commonplace English meaning of reference to physical and mental facts, as distinguished from *"injuria"* are a prerequisite to maintaining an action, but does deny emphatically that under the Federal Statutes upon which he bases his rights of action the *"injuria"* are the same as the *"injuria"* upon which plaintiff relies in the Common Law Action of Negligence. This statement is made in general terms at present for the purpose only of clearing away the ground for discussion. What specifically is meant, will be stated more in detail below.

Also with the intention of clarifying the discussion the plaintiff states that counsel for the defendant unconsciously did not state accurately what he alleged in his argument before the Court, to be admissions in plaintiff's reply to defendant's answer; and it is important to note the difference between the real substance of plaintiff's admission and what counsel for defendant (erroneously plain-

tiff thinks) considers to have been the substance of plaintiff's admission.

Defendant's learned counsel stated in his argument that plaintiff in his reply to defendant's answer admitted that the "accident" alleged to have occurred is the same "accident" in the case of both lawsuits.

It may make no difference. All depends upon the connotation of the word "accident." If the word "accident" connotes *only* the tripping of the plaintiff, his falling out of the cab and his physical and mental injuries resulting therefrom, all that, the plaintiff readily admits, will be found referred to in both lawsuits, but if any one item of alleged failure in legal duty on defendant's part is a part of the connotation of the word "accident" as applied in this case, then the plaintiff EMPHATICALLY AND MOST STRENUOUSLY DENIES any such admission in his reply.

The distinction, often not well noted, between "injuries" as used in the Federal Act and *"injuria"* and the different possible connotations of the word "accident" should be borne in mind most carefully. Otherwise, particular danger exists in the instant case of being misled by the "fallacy of ambiguous middle" or of using the middle term in two different senses in the major and minor premises [29] of the syllogism.

Specifically what the plaintiff did admit is shown in paragraph 7 of his reply, as follows:

"Plaintiff admits that the falling out of the cab and locomotive and the physical injury, pain and

suffering, the loss of employment, and the permanent impairment of plaintiff's earning power and ability resulting therefrom are the same as those referred to in plaintiff's former complaint mentioned in defendant's third affirmative defence, but also alleges that the negligence on the part of the defendant and the present cause of action based thereon are not the same as those set forth in his said former complaint, and denies each and every other allegation in said paragraph seven of defendant's third affirmative defence."

Assuming for the sake of argument that the case of Jenkins et al. vs. Atlantic Coal R. Co., 179 Fed. 535 (cited by counsel for defendant) correctly states the law in Common Law actions of negligence, paragraph 7 of plaintiff's reply, would be an admission (inferentially at least) that both the accident and the *"injuria"* were identical in both the former and the present action of the plaintiff against the defendant, whether the word "accident" was used in the two different senses referred to above or not, IF THESE TWO CASES OF MILLER VS. THE SPOKANE INTERNATIONAL RAILWAY COMPANY HAD BEEN CASES FOUNDED UPON THE COMMON LAW ACTION OF NEGLIGENCE, BUT NOT WHEN IN FACT THESE ACTIONS ARE BROUGHT UNDER THE FEDERAL STATUTE.

In the Jenkins case, the plaintiff had previously brought an action in a South Carolina court against one defendant railroad company for "damages for the same injuries" as set forth in the second

complaint against another defendant railroad company; and it was contended by the defendant in the federal court case that privity existed between the defendant railroads in each case and that the judgment for the defendant in the state court was a bar to the action in the federal court. [30]

The question arose in the Circuit Court of the United States for the District of South Carolina on plaintiff's motion to strike from the defendant's answer the defence outlined above. This motion the Court denied.

The Circuit Court of the United States held that privity did exist between the defendants in each of the cases.

Secondly, the Court said that the plaintiff's cause of action was that of a passenger against a carrier IN NOT SAFELY CARRYING HER. NOTE HERE THE GENERAL DUTY OF SAFE CARRIAGE UNDER THE COMMON LAW AS AGAINST THE SPECIFIC DUTY TO DO SPECIFIC THINGS PLACED UPON CARRIER BY THE FEDERAL STATUTE, WHICH WILL BE QUOTED LATER.

The Court showed by the evidence that also the specific acts of negligence in violation of the general duty imposed by the Common Law, shown in the two cases were really identical, as disclosed by the evidence. Hence this was of itself sufficient ground for the Court's decision in the federal case.

But the Court went on and said, page 538 (the capitalization of sentences being ours), whether that were so or not, a party who had a cause of

action growing out of a tort, cannot be permitted to divide the tort, and make it the subject of different suits.

"The plaintiff's cause of action here is that as a passenger, she had a right to safe carriage. That is her primary right, and there is a corresponding primary duty devolving upon the carrier to safely carry her. It was for this neglect of duty—this delict—resulting, as she alleged in injury to her, that she claims damages against the carrier. THIS IS AN ENTIRE CLAIM FOR A SINGLE TORT, AND ALL THE VARIOUS ITEMS TENDING TO SHOW NEGLIGENCE ON THE PART OF THE CARRIER AND ALL OF THE ELEMENTS OF DAMAGE TO HER RESULTING FROM SUCH NEGLIGENCE MUST BE INCLUDED IN THE ONE ACTION WHEREIN SHE IS ENTITLED TO RECOVER SUCH COMPENSATION AS SHE MAY BE ENTITLED TO FOR EACH AND ALL OF SUCH ITEMS."

In commenting upon this case, let us note that the Common Law action of Negligence arose as one of the forms of the old action (under the statute of Westminster II, 13 Edward I, C. 24) of Trespass on the case and that three elements are essential to its existence as an action of negligence; [31]

(1) The existence of a duty on the part of defendant to protect plaintiff from the injury.

(2) Failure of defendant to perform that duty; and

(3) Injury to plaintiff from such failure of defendant, 29 Cyc. 419, Article Negligence.

When any injury results to the plaintiff from failure of defendant to perform his LEGAL DUTY towards the plaintiff, a cause of action arises.

As was the case under the old statute of Westminster II, so also under the Federal Acts it is true that WHEN ANY INJURY RESULTS TO THE PLAINTIFF FROM FAILURE OF THE DEFENDANT TO PERFORM HIS LEGAL DUTY TOWARDS THE PLAINTIFF A CAUSE OF ACTION ARISES.

Consideration of both these laws, the old common law, based upon the ancient statute, and the modern federal laws discloses clearly the fact that the test as to the number of actions that can be maintained depends not only upon the question as to the number of injuries (using the word not as connoting *"injuria"* but as connoting physical, mental or pecuniary damage) but UPON THE NUMBER OF LEGAL DUTIES VIOLATED. One right of action exists (under both the ancient and the federal law), for *each legal duty violated, regardless* of the number of physical, mental or pecuniary injuries inflicted. The Jenkins case itself is clear upon this point. See *supra.*

The essential difference between the two laws lies in the fact that under the old law based on the ancient statute THE LEGAL DUTY CLEARLY WAS GENERAL, while, on the other hand, under the modern federal statutes, the LEGAL DUTY CLEARLY IS SPECIFIC.

Under act of April 22, 1908, Ch. 149, 35 Stat. L. 65, Barnes Federal Code, 8069, 8 Fed. Stat. Ann. (2d. ed.) page 1208, Compiled Stats. 8657, constituting part of the Federal Employers' Liability Act, also known as the "Sterling Act," and sometimes styled the "Second Employers' Liability Act" it is enacted (the large type being ours), that "Every common carrier, by railroad, while engaging in commerce between any of the several states or territories * * * or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury or death resulting in whole or in part * * * [32] by reason of ANY DEFECT OR INSUFFICIENCY, due to its negligence in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment."

The right of action according to the words of the act above quoted does not arise out of violation of a general primary duty of the defendant to furnish safe tools, a safe place to work, etc., and a violation of a corresponding general primary right of the plaintiff to have been furnished with safe tools and appliances and a safe place in which to work; but it arises out of a violation of plaintiff's right that there should not exist any specific defect by reason of which the plaintiff has suffered injury.

The particular rights of the plaintiff and the particular duties of the defendant towards the

plaintiff are found in the Federal Locomotive Boiler Inspection Law, so called, as amended March 4, 1915, and in the RULES AND INSTRUCTIONS FOR INSPECTION AND TESTING OF STEAM LOCOMOTIVES AND TENDERS, approved by orders of the Interstate Commerce Commission, dated October 11, 1915, June 30, 1916, November 13, 1916, December 26, 1916, December 17, 1917 and April 7, 1919.

See Act of Feby. 17, 1911, Ch. 103, 36 Stat. (913 et seq. or Locomotive Boiler Inspection Law.)

Act of March 4, 1915, Ch. 169, 38 Stat. L. 1192 or amendment of the above law. (See 8 Fed. Stat. Ann. 2d. Ed., pages 1200–1206, Barnes Federal Code, Secs. 8046 to 8057, both inclusive, U. S. Compiled Statutes, Sections 8630 to *8629* inclusive and Secs. 8639b and 8639c.) See also laws, Rules and Instructions of Interstate Commerce Commission referred to above.)

By these various statutes and rules and regulations made by the Interstate Commerce Commission, it appears—

(a) By the Boiler Locomotive Inspection Law that it is unlawful for any common carrier engaged in interstate or foreign traffic to use any locomotive engine propelled by steam power unless its boiler and appurtenances are in a proper condition safe to operate; [33]

(b) By the amendment above referred to (approved March 4, 1915,) the Locomotive Boiler Inspection Law is made to apply to and include the

entire locomotive and tender and all parts and appurtenances thereof;

(c) By section 5 of the original act (the Boiler Locomotive Inspection Law) which by the amendment referred to in (b) is made to apply to the entire locomotive and tender and all parts and appurtenances thereof, each carrier subject to this act, is required to file rules and instructions for inspection with the chief inspector appointed under Section 3 of the act by the President of the United States, and these rules and instructions subject to such modifications as the Interstate Commerce Commission requires, shall become obligatory upon the carrier. If the carrier fails to file the rules and instructions, the chief inspector is required to prepare such, which after approval by the Interstate Commerce Commission, shall be obligatory upon the carrier, and a violation of such by the carrier is made unlawful and is subject to punishment under the act;

(d) That the Chief Inspector also is required under Section 5 of the original act to make all needful rules, regulations and instructions for the conduct of his office and for the government of the district inspector required under the act;

(e) That June 2, 1911, the Interstate Commerce Commission, after noncompliance by many carriers with the directions to make rules and instructions, and on the request of all the carriers who had made such rules and instructions prepared new rules and instructions for all carriers under the act;

(f) That thereafter these rules, regulations and instructions were modified and added to by the Interstate Commerce Commission from time to time applying to the locomotives, tenders and all of their parts and appurtenances;

(g) That among the rules and instructions in accordance with the amendment of March 4, 1915, to the Boiler Locomotive Inspection Act, approved by orders of the Interstate Commerce Commission see page 54 of Laws, Rules and Instructions for Inspection, and Testing of Steam Locomotives and Tenders is rule 117 as follows: [34]

"117 cab aprons—Cab aprons shall be of proper length and width to insure safety, * * *

Also among said rules (see page 66) is the following:

"152 * * * (c) The minimum width of the gangway between locomotive and tender, while standing on straight track shall be 16 inches";

(h) That under Section 9 of the Boiler Locomotive Inspection Act "any common carrier violating this act or any rule or regulation made under its provisions * * * shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States Attorney having jurisdiction in the locality" etc.

It is therefore respectfully submitted under the above quoted and referred to rules, regulations and instructions;

1. That the defendant in the instant case is liable to the plaintiff, not for the violation of a

general duty to provide him with safe tools and appliances and a reasonably safe place in which to work, but for *any injury resulting from any defect due to its negligence.*

2. THAT THE DEFENDANT IS LIABLE TO THE PLAINTIFF FOR ANY INJURY RESULTING FROM THE SPECIFIC ACT OF NEGLIGENCE ARISING FROM ITS VIOLATION OF ANY PART OF RULE 117 OR OF RULE 152–C OF THE LAWS, RULES AND INSTRUCTIONS ABOVE QUOTED.

3. THAT THE RULE IN THE JENKINS CASE CITED BY THE LEARNED COUNSEL FOR THE DEFENDANT DOES NOT APPLY TO THE INSTANT CASE.

The United States Supreme Court has said on the question of negligence, "IT IS OF COURSE SETTLED THAT IF THE EQUIPMENT WAS IN FACT DEFECTIVE OR OUT OF REPAIR, THE QUESTION WHETHER THIS WAS ATTRIBUTABLE TO THE COMPANY'S NEGLIGENCE IS IMMATERIAL." Spokane etc. R. Co. vs. Campbell, 241 U. S. 497, S. C. 683, 60 U. S. (L. Ed.) 1125 at 1134. United States vs. Oregon-Washington R. & N. Co., 6, 213 Fed. 689 at 690 per Judge Rudkin. [35]

A VIOLATION OF THE SAFETY APPLIANCE ACT IS NEGLIGENCE PER SE.

Lemme vs. Texas etc. Ry. Co., 141 L. A. 769, 75 *sc.* 676.

See, also, Judge Rudkin's statement in Campbell in Spokane & Inland Empire R. Co., 188 Fed-

eral 516, pp. 517, 518, "When a statute is designed to protect a particular class of persons against a particular class of injuries, a violation of the statutory duty constitutes negligence *per se* whenever one of the protected class is injured from a cause against which the statute was designed to protect him." A good illustration of the fact that the rights granted and duties imposed by the Federal Acts under discussion are SPECIFIC and not general is illustrated in the remarks of Buffington, Circuit Judge, in U. S. vs. Erie R. Co., 212 Fed. 853, at 859. "These duties of air-brake equipment and air-brake use are separate and distinct," etc. See, also, U. S. vs. Pere Marquette Co., 211 Fed. 221;

Louisville & N. R. Co. vs. Layton, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931, at 933;

St. Joseph & Grand Island Railway Co. vs. Moore, 243 U. S. 311, 37 Sup. Ct. Ref. 278, 61 L. Ed. 741 at 745, 746.

The conclusion seems unavoidable.

(a) That the rules requiring cab aprons to be of proper length and width to insure safety and the minimum width of the gangway between locomotive and tender, while standing on straight track to be 16 inches, are specific rules under the safety appliance acts designed to protect a particular class of persons, namely locomotive engineers and firemen, against a particular class of injuries.

(b) The violation of this specific duty is negligence *per se* and

(c) That therefore a specific right of action exists on the part of the plaintiff against the defendant in the instant case for the specific acts of negligence mentioned in the complaint.

Furthermore the violation of the rules referred to above constitute penal offenses under Section 9 of the Locomotive Boiler Inspestion Law. See *supra.* [36]

It is plain under the words of section 9 that the defendant carrier is liable to the imposition of the penalty for each rule or regulation violated.

Such being the case, a civil liability in favor of the person injured exists as well as the penal liability.

When the protection imposed by the Statute for violation of which the penalty is imposed is for the benefit of a class or individual of a class, an individual right of action accrues to the party injured.

1 C. J. (Article Actions) 957 and note, 30;

Harrod vs. Latham Mercantile and Commercial Co., 77 Kan. 466, 99 Pac. 10;

Berdos vs. Tremont and Suffolk Mills, 209 Mass. 489, 95 N. E. 876;

The Union Pacific Railway Company vs. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, 443.

San Antonio vs. A. P. R. Co. vs. Wagner 241 U. S. 476, 36 Sup. Ct. 626, 60 L. Ed. 1110. In this last-mentioned case, the Supreme Court distinctly says, Page (L. Ed. 1117) THAT A DISREGARD OF THE COMMAND OF THE SAFETY APPLI-

ANCE ACT "IS A WRONGFUL ACT, AND WHERE IT RESULTS IN DAMAGE to one of the class for whose special benefit the Statute was enacted, the right to recover the damages is implied." "If this act is violated, the question of negligence in the general sense of want of care is immaterial, 241 U. S. 43, and cases there cited. But the two Statutes are *in pari materia*, and where the Employers' Liability Act refers to "any defect or insufficiency, DUE TO ITS NEGLIGENCE, in the cars, engines, appliances" etc., it is clearly the legislative intent to treat a violation of the Safety Appliance Act as 'negligence'—what is sometimes called negligence *per se.*"

The caps above were ours.

Mr. Justice Moody, St. Louis, I. M. & S. Ry. Co. vs. Taylor, 210 U. S. 281, 52 L. Ed. 1061 emphasizes the point that the duty imposed by the safety appliance acts is SPECIFIC, and that the violation of each specific duty, when resulting injury, is actionable.

On page 1067 he says "We need not enter into the wilderness of cases upon the common law duty of the employer to use reasonable care [37] to furnish his employee reasonably safe tools, machinery and appliances, or consider when and how far that duty may be performed * * * In the case before us, the liability of the defendant does not grow out of the common law duty of master and servant. The Congress, not satisfied with the Common Law duty, and its resulting liability, has prescribed and defined the duty by Statute * * * The

obvious purpose of the legislature was to supplant the qualified duty of the Common Law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured thereby." Can anything be more plain?

In order that the rule of *res adjudicata* or the rule against splitting of actions shall apply, the second action must refer to a legal duty, the violation of which was the basis of the first action. This was not the case here, for reasons above given.

Before the rule of *res adjudicata* or the rule against splitting of actions can apply, there must be in the two actions to which the rules are sought to be applied identity (1) of subject matter, (2) of cause of action, (3) of parties and (4) of quality of persons.

Eteburn vs. Neary, 186 Pac. 457;
Privett vs. U. S., 261 Fed. 351;
Hoffmeier vs. Trost, 85 Atl. (N. J.) 221.

A proper test to apply in determining this question is to ascertain whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first.

Hoffmeier et al. vs. Trost (*supra*).
Sarson vs. Maccia, 108 Atl. 109.

It is plain that applying this test judgment in the first Miller action is not a bar to the second,

and that the rule against splitting actions is not violated in bringing the second suit.

If full recovery of damages had been had on judgment for plaintiff following a verdict in his favor in the first suit, doubtless recovery could not have been had in the second suit, not because [38] the legal duty violated was the same in each suit (for plainly it was not) because the injuries were the same, and the plaintiff having been compensated once, he could not be compensated a second time.

Besides, the fact that two distinct acts of negligence resulting in the same injuries is no bar to an action based on one of them.

See remarks of District Judge Shiras in Voelker vs. Chicago M. & St. P. Ry. Co., 116 Fed. 867 at 875.

The objection that under the rule for which plaintiff contends, a defendant could be vexed with continual and numerous lawsuits. We respectfully submit, is not a valid objection in the instant case.

(1) Because the short period of the Statute of Limitations (2 yrs.) practically negatives the idea of continual vexation.

(2) Because the plain words of the Statutes are not to be disregarded (see Mr. Justice Moody's remarks on that point in St. Louis M. & S. Ry. Co. vs. Taylor, *supra*, 52 L. Ed., at page 1068), and

(3) Because the essential purpose of the acts is the protection of the lives and limbs of employees and passengers and railroads are required strictly to comply with its provisions.

See remarks of District Judge Reed in U. S. vs. Chicago Great Western Ry. Co., 162 Fed. 775 at 778. See also remarks of District Judge Van Fleet in U. S. vs. Northwestern Pac. R. Co., 235 Fed. 965, bottom of pages 969 and 970.

Plaintiff respectfully submits that defendant's motion to dismiss should be denied.

GEORGE D. AYERS,
Plaintiff's Attorney.

P. O. Address, 514 Ziegler Bldg., Spokane, Wash.

Rec'd copy April 12–'22.

ALLEN, WINSTON & ALLEN.
G. [39]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3716.

GEORGE E. MILLER,
Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,
Defendant.

Memorandum.

GEORGE D. AYERS, Attorney for the Plaintiff.

ALLEN, WINSTON & ALLEN, Attorneys for the Defendant.

RUDKIN, District Judge.—This is an action to recover damages for personal injuries. The an-

swer interposes the defense of *res adjudicata,* and inasmuch as that defense has not been denied the defendant has moved for judgment on the pleadings. One of the regulations of the Interstate Commerce Commission regarding cab aprons is as follows:

> "Cab-aprons shall be of proper length and width to insure safety. Aprons must be securely hinged, maintained in a safe and suitable condition for service, and roughened, or other provision made, to afford secure footing."

In a former action prosecuted by the same plaintiff to recover for the same injuries the neglect charged in the complaint was twofold. First, because the cab-apron was not roughened or other provision made to afford a secure footing as required by the regulations of the Interstate Commerce Commission; and second, because the apron extended upwards from the floor of the tender a distance of from one to one and one-half inches.

Upon a trial of that action there was a verdict and judgment for the defendant.

In the second action to recover damages for the same wrong and for the same injuries a recovery is sought on the ground that the cab-apron was not of proper length and width to insure safety. [40] Upon the argument I was of opinion that the former judgment was a complete bar, and an examination of the authorities only tends to confirm me in that opinion. The plaintiff earnestly insists that he has a right of action for each and every breach of a statutory duty and that a judgment

against him in an action for one breach is no defense to a second action for another and different breach, although the injuries complained of in both actions are one and the same. To this contention I cannot yield assent, and the decisions in both the state and federal courts are against it.

In Sayward vs. Thayer, 9 Wash. 22, Chief Justice Dunbar said:

> "The general doctrine is that the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising a reasonable diligence, might have brought forward at the time."

To the same effect, see Cromwell vs. County of Sac., 94 U. S. 351, and Board of Comm'rs vs. Platt, 79 Fed. 567. The scope of the estoppel is not the same in all cases. Thus, where the second action is between the same parties but upon a different claim or demand, the estoppel is limited to the points in issue and actually determined in the first action. But where the second action is upon the same claim or demand the estoppel extends not only to the points at issue in the first action but to all claims and all defenses that might have been advanced or interposed by the respective parties. This distinction is clearly pointed out in the Cromwell case, *supra*. And inasmuch as the second action here is upon the same claim or demand as was the first, the

estoppel extends not only to the matters at issue in the former action but to each and every claim of negligence which the plaintiff might advance in support of his right of recovery. No doubt, as claimed by the plaintiff, the law gives a right of action for each and every breach of a statutory duty, but where several breaches result in a single injury it gives but one right of action and no more. And under this rule it is entirely immaterial whether the charge of negligence is based on the rules of the common law or upon a state or federal statute. [41]

As said by the Court in Jenkins vs. Atlantic Coast Line R. Co., 179 Fed. 535, 539:

> "This is an entire claim for a single tort, and all the various items tending to show negligence on the part of the carrier, and all of the elements of damage to her resulting from such negligence must be included in the one action wherein she is entitled to recover such compensation as she may be entitled to for each and all of such items."
>
> " 'Experience has disclosed that for the security of rights and the preservation of the repose of society a limit must be imposed upon the facilities for litigation.' "

Or, as said by Judge Dunbar in Sweeney vs. Waterhouse & Co., 43 Wash. 613, 616:

> "It is hardly worth while to go into a discussion of the doctrine of *res adjudicata* and the cases cited thereon. This Court has, in more recent cases, somewhat modified the doc-

trine as announced in the earlier cases, where the old rule was laid down that the plea of *res adjudicata* applies not only to points which were raised, but to those which might have been raised in the trial of the former action. But no court, we think, has gone so far as to allow a litigant to experiment with a court by trying his case piecemeal. The cause of action which the appellants now urge was available to them at the former trial, the assignments set forth in the complaint having been obtained prior to the commencement of the first action. They should not be allowed to split their causes of action, try their case out on a part of the causes, and if they fail, commence another action setting forth the other causes."

The motion for judgment on the pleadings is therefore granted, and the action is dismissed.

Filed in the U. S. District Court, Eastern District of Washington. April 17, 1922. Alan G. Paine, Clerk. By Eva M. Hardin, Deputy. [42]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Judgment.

This cause coming on to be heard on defendant's motion to dismiss and for judgment on the pleadings, the Court having heard argument and being advised in the premises, it is by the Court

ORDERED, ADJUDGED AND DECREED that said motion be and the same is hereby granted; that plaintiff go hence without day and take nothing by this action; that the same be dismissed and that defendant, Spokane International Railway Company, a corporation, do have and recover of and from plaintiff, George E. Miller, its costs herein in the sum of $22.90 dollars, as taxed by the Clerk of this Court, and let execution issue therefor.

Done in open Court this 24th day of April, A. D. 1922.

FRANK H. RUDKIN,
Judge.

Approved as to form:

GEORGE D. AYERS,
Pltfs. Atty.

Copy received April 24, 1922.

GEORGE D. AYERS,
Pltfs. Atty.

Filed in the U. S. District Court, Eastern District of Washington. April 24, 1922. Alan G. Paine, Clerk. By Eva M. Hardin, Deputy. [43]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

To the Honorable FRANK H. RUDKIN, Judge of the District Court aforesaid.

Now comes George E. Miller, plaintiff in the above-entitled action by George D. Ayers his attorney and respectfully shows that on the 17th day of April, 1922, the Court granted the motion of the defendant to dismiss said action and for judgment on the pleadings therein and April 24, 1922, signed its final judgment therein and the same was entered on the 24th day of April, 1922, against your petitioner.

Your petitioner, feeling himself aggrieved by said granting of said motion to dismiss and for judgment for defendant on the pleadings and by the judgment entered thereon as aforesaid, herewith petitions the Court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit

under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at San Francisco, in the State of California, in said circuit for the correction of the errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by plaintiffs [44] in error conditioned as the law directs, and that a transcript of the record, proceedings, and papers upon which said decision and judgment were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 23d day of October, 1922.

GEORGE D. AYERS,

Attorney and Counsel for Petitioner in Error.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 23, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [45]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

AT LAW —No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Assignments of Error.

Now comes George E. Miller, plaintiff in the above numbered and entitled cause, and in connection with his petition for a writ of error in this cause assigns the following errors which plaintiff in error avers occurred in the proceedings below and upon which he relies to reverse the judgment entered herein as appears of record:

(1) That the Court erred in granting defendant's motion for an order dismissing the action and for judgment on the pleadings.

(2) That the Court erred in ordering, adjudging and decreeing judgment on the pleadings for the defendant, that the action be dismissed and that the defendant Spokane International Railway Company do have and recover of and from the plaintiff George E. Miller its costs therein.

(3) That the Court erred in finding and ruling in its memorandum decision that the defense of *res adjudicata* was not denied.

(4) That the Court erred in finding and ruling in its memorandum decision that the former judgment in the case of George E. Miller, plaintiff, against Spokane International Railway Company, a corporation, defendant, #3545 in the above-entitled Court was a complete bar to the present action.

(5) That the Court erred in finding and ruling that the injuries complained of in said former and the present action are one and the same. [46]

(6) That the Court erred in finding and ruling in said memorandum decision that the second action or in other words the present action is upon the same claim or demand as said first action #3545.

(7) That the Court erred in finding and ruling in its memorandum decision that the two breaches referred to in said memorandum decision, one being the negligence referred to in the first and the other being the negligence referred to in the second action above referred to, resulted in a single injury.

(8) That the Court erred in finding and ruling in its said memorandum decision that it is immaterial whether the charge of negligence stated and referred to in the complaint of the plaintiff in error in the present action is based upon the rules of the common law or upon a state or federal statute.

(9) That the Court erred in its memorandum decision in its statement "No doubt, as claimed by the plaintiff, the law gives a right of action for each and every breach of a statutory duty, but

where several breaches result in a single injury it gives but one right of action and no more" in that in the statement therein "But where several breaches result in a single injury it gives but one right of action and no more" there is a confusion in the use of the phrase "single injury," the plaintiff in error herein claiming that in the above-entitled action the "injury" complained of is not the same injury as the injury complained of in said former action #3545 although the physical damage resulting from the two different legal injuries or acts of negligence referred to one in the first and the other in the second of the said two actions respectively, may be the same.

(10) That the Court erred in that its said rulings, findings, granting of said motion to dismiss plaintiff's complaint and for judgment on the pleadings and the judgment for the defendant entered in accordance therewith were and are in contravention of the Fourteenth Amendment of the Constitution of the United States, and [47] if not reversed, would take away without due process of law a valuable property right guaranteed the plaintiff by the Constitution of the United States and Articles in Amendment thereof.

WHEREFORE plaintiff in error prays that the judgment of said Court be reversed and the cause remanded for such further proceedings as are required by the principles of law, the statutes in such case as made and provided and the record in this case.

GEORGE T. AYERS,
Attorney and Counsel for Plaintiff in Error.

Filed in the U. S. District Court Eastern District of Washington. Oct. 28, 1922. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [48]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Writ of Error Bond.

KNOW ALL MEN BY THESE PRESENTS that we, George E. Miller as principal and Fidelity and Deposit Company of Baltimore, Maryland, but doing business in the City and County of Spokane and State of Washington as surety, are held and firmly bound unto Spokane International Railway Company, a corporation in the full and just sum of Three Hundred Dollars ($400.00) to be paid to the said Spokane International Railway Company, its attorneys, successors, administrators, executors, or assigns, to which payment well and truly to be made we bind ourselves, our successors, assigns, executors and administrators, jointly and severally by these presents.

Signed and dated this the 23d day of October, A. D. 1922.

Whereas at a regular term of the District Court

of the United States for the Eastern District of Washington, Northern Division, sitting at Spokane, Washington, in said District, in a suit pending in said Court between George E. Miller, as plaintiff and Spokane International Railway Company, a corporation as defendant, cause No. 3716, on the law docket of said Court final judgment was rendered against the said George E. Miller dismissing the complaint of said George E. Miller and ordering, adjudging and decreeing that the defendant Spokane International Railway Company, a corporation, do have and recover of and from plaintiff George E. Miller, its costs, and the said George E. Miller, has obtained a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment of the said Court in the aforesaid suit, and a citation directed to the said Spokane International Railway Company, a corporation, defendant in error, citing it to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California, according to law within thirty days (30) from the date hereof.

Now the condition of the above obligation is such that if the said George E. Miller shall prosecute his writ of error to effect and answer all costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

GEORGE E. MILLER. [Seal]

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

By S. M. SMTH,
Its Attorney in Fact.

Attest:

W. L. BERRY,
General Agent.

Approved:

A. G. PAINE,
Clerk.

October 23, 1922. [49]

Filed in the U. S. District Court, Eastern District of Washington, October 23, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [50]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

On this 23d day of October, 1922, came the plaintiff, George E. Miller, and filed herein and presented to the Court its petition praying for the allowance of a writ of error, and filed therewith its assignments of error intended to be urged by it, and that an order be made fixing the amount of security to be given by plaintiffs in error condition as the law

directs, and that a transcript of the record, proceedings and papers upon which said decision and judgment were made, duly authenticated, may be sent to the United States Circuit Court of Appeals, and such other and further proceedings may be had as may be proper in the premises.

In consideration thereof the Court does allow the writ of error and the bond for such writ of error, fixed at the sum of Three Hundred (300) dollars.

FRANK H. RUDKIN,
United States District Judge.

Filed in the United States District Court, Eastern District of Washington. Oct. 28, 1922. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [51]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

AT LAW—No. 3716.

GEORGE E. MILLER,
Plaintiff in Error,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,
Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States WARREN G. HARDING to the Honorable Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between George E. Miller, plaintiff in error, and Spokane International Railway Company, a corporation, defendant in error, a manifest error has happened to the damage of George E. Miller, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in the State of California, where said Court is sitting, within thirty (30) days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right and accord-

ing to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 23d day of October, A. D. 1922.

ALAN G. PAINE,
Clerk of the United States District Court, Eastern District of Washington, Northern Division.

Allowed this 23d day of October, A. D. 1922.

FRANK H. RUDKIN,
Judge.

Filed in the United States District Court, Eastern District of Washington. Oct. 23, 1922. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [52]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

AT LAW—No. 3716.

GEORGE E. MILLER,
Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,
Defendant.

Citation.

The President of the United States of America to Spokane International Railway Company, a corporation and to Frank D. Allen, Esquire and Alex M. Winston, Esquire, your attorneys of record GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, in the State of California, within thirty (30) days from the date of this citation, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein George E. Miller is plaintiff in error, and you, The Spokane International Railway Company are defendant in error, to show cause if any there be, why the judgment rendered against the plaintiff dismissing its complaint, and ordering, adjudging and decreeing that the defendant Spokane International Railway Company do have and recover from the plaintiff George E. Miller its costs, as in said writ of error mentioned should not be corrected, and why speedy justice should not be rendered to the petitioner in that behalf.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 23d day of October, 1922, and in the

One Hundred and Forty-sixth year of the [53] Independence of the United States.

Attest:

FRANK H. RUDKIN,
United States District Judge.

Copy of above citation received Oct 26, 1922.

ALLEN, WINSTON & ALLEN,
Attorneys for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 23, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [54]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Praecipe for Transcript of Record.

Praecipe for transcript on appeal to Alan G. Paine, Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division. Whereas the above-named plaintiff, George E. Miller, on the twenty-third (23) day of October, 1922, petitioned the above-entitled

Court for an order allowing him to present a writ of error to the Circuit Court of Appeals of the United States for the Ninth (9) Circuit and said order allowing said writ of error was made and entered on said twenty-third (23) day of October, 1922, and bond fixed by the Court and said writ of error was duly issued on said date ordering that the record and proceedings aforesaid be sent with this writ to said United States Circuit Court of Appeals for the Ninth (9) Circuit. Now, therefore, in accordance with the rule and practice of the above-entitled Court you are hereby requested in making up the transcript of said record and proceedings to enter in said transcript the following part of the records the same being what the complaint and appeal deem material to the review of the defense of this Court in said Circuit Court of Appeals for the Ninth (9) District, to wit:

1. The original bill of complaint.
2. The summons and return.
3. Defendant's answer.
4. Plaintiff's reply.
5. Motion to dismiss.
6. Motion to amend complaint.
7. Order amending complaint.
8. Amended complaint.
9. Appearance of defendant.
10. Plaintiff's brief on motion to dismiss.
11. Memorandum opinion of Court on motion to dismiss.
12. The order of judgment.
13. The petition for writ of error.

14. Assignments of error.
15. Bond on appeal.
16. Order allowing writ of error on bond. [55]
17. Writ of error.
18. Citation on said writ of error.
19. Praecipe.
20. Motion for extension of time.
21. Order extending time.

You are hereby requested to prepare the above transcript according to the rules and practice of the above-entitled Court.

Dated this 23d day of October, 1922.

GEORGE D. AYERS,
Attorney for Plaintiff.

Filed in the U. S. District Court, Eastern District of Washington. Nov. 2, 1922. Alan G. Paine, Clerk. By A. P. Rumburg, Deputy. [56]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Motion for Extension of Time for Citation.

Comes now the plaintiff and moves that the time for the return of the Citation on the writ of error in the above-entitled cause which was made returnable within thirty (30) days from October 23, 1922, be extended to and including the twenty-second (22) day of December, 1922, for the reason that it will be difficult, if not impossible, to make up the transcript on appeal in season to be filed in the office of the Clerk of the Circuit Court of Appeals in San Francisco within the period allowed for the return of said citation as the return date now stands.

GEORGE D. AYERS,
Attorney and Counsel for Plaintiff.

Filed in the U. S. District Court, Eastern District of Washington. Nov. 17, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [57]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY CO.,

Defendant.

Order Extending Time for Return of Citation to and Including December 22, 1922.

Upon consideration of the Motion of the plaintiff and good cause shown

IT IS ORDERED that the date for the return of the citation in the above-entitled cause which was heretofore made returnable within thirty (30) days from October 23, 1922, is hereby extended to and including the twenty-second (22) day of December, 1922.

Done in open Court this 17th day of November, 1922.

FRANK H. RUDKIN,
District Court Judge.

Filed in the U. S. District Court, Eastern District of Washington. Nov. 17, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy [58]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Certificate of Clerk to Transcript of Record.

United States of America,
Eastern District of Washington,—ss.

I, Alan G. Paine, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing printed pages, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings as called for by the defendant and plaintiff in error in its praecipe therefor, and as the same remain of record and on file in the office of the Clerk of Said District Court, and that the same constitute the record on writ of error from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of Nineteen and 60/100 ($19.60) Dollars, and that the same has been paid to me by George D. Ayers, attorney and counsel for plaintiff, and plaintiff in [59] error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said district, this 18th day of December, A. D. 1922.

[Seal] ALAN G. PAINE,
Clerk. [60]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant.

Citation (Original).

The President of the United States of America to Spokane International Railway Company, a corporation, and to Frank D. Allen, Esquire and Alex M. Winston, Esquire, your attorneys of record, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, within thirty (30) days from the date of this citation, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein George E. Miller is plaintiff in error, and you, The Spokane International Railway Company, are defendant in error, to show cause if any there be, why the judgment rendered against the plaintiff dismissing its com-

plaint, and ordering, adjudging and decreeing that the defendant Spokane International Railway Company do have and recover from the plaintiff George E. Miller its costs, as in said writ of error mentioned should not be corrected, and why speedy justice should not be rendered to the petitioner in that behalf.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 23d day of October, 1922, and in the One Hundred and Forty-sixth year of the Independence of the United States.

Attest: F. H. RUDKIN,
United States District Judge. [61]

Copy of above citation received Oct. 26, 1922.
ALLEN, WINSTON & ALLEN,
Attys. for Deft.

[Endorsed]: 3716. George E. Miller vs. Spokane International Railway Co. Citation. Filed in the U. S. District Court, Eastern Dist. of Washington. Oct. 23, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [62]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

AT LAW—No. 3716.

GEORGE E. MILLER,

Plaintiff in Error,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,

Defendant in Error.

Writ of Error (Original).

United States of America,—ss.

The President of the United States, WARREN G. HARDING, to the Honorable Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between George E. Miller, plaintiff in error, and Spokane International Railway Company, a corporation, defendant in error, a manifest error has happened to the damage of George E. Miller, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf do command you if judgment be therein given, that under your seal you

send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in the State of California, where said Court is sitting, within thirty (30) days from the date hereof (in the said Circuit Court of Appeals to be then and there held), and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right and according to [63] the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 23d day of October, A. D. 1922.

ALAN G. PAINE,

Clerk of the United States District Court for the Eastern District of Washington, Northern Division.

Allowed this the 23 day of October, A. D. 1922.

F. H. RUDKIN,

United States Judge. [64]

[Endorsed]: No. ——. George E. Miller vs. Spokane International Railway Co. Writ of Error. Filed in the U. S. District Court Eastern Dist. of Washington. Oct. 23, 1922. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [65]

[Endorsed]: No. 3957. United States Circuit Court of Appeals for the Ninth Circuit. George E. Miller, Plaintiff in Error, vs. Spokane International Railway Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filed December 21, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

Case No. 3957.

GEORGE E. MILLER,
Plaintiff in Error,

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation,
Defendant in Error.

The Clerk will enter my appearance as counsel for defendant in error.

ALEX M. WINSTON,
F. D. ALLEN,

_____,

Office Address 1107 Paulsen Bldg., Spokane, Washington.

Note.—Appearance cannot be entered unless the counsel signing is a member of the Bar of this

Court, or of the Supreme Court of the United States, or of a District Court within the Ninth Circuit. See Rule 7, C. C. A.

Individual and not firm names must be signed.

[Endorsed]: No. 3957. United States Circuit Court of Appeals for the Ninth Circuit. Praecipe for Entry of Appearance. Filed Dec. 29, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3957.

GEORGE E. MILLER

vs.

SPOKANE INTERNATIONAL RAILWAY COMPANY, a Corporation.

Stipulation for Hearing of the Appeal at Seattle, Washington.

In accordance with the provisions of Rule 36 of the United States Circuit Court of Appeals for the Ninth Circuit it is hereby stipulated by and between the parties to this action that the writ of error herein shall be heard at the next annual term

of said Circuit Court of Appeals in the City of Seattle in the State of Washington.

GEORGE E. MILLER, Plaintiff, by his Attorney and Counsel,

GEORGE D. AYERS.

SPOKANE INTERNATIONAL RAILWAY COMPANY, Defendant, by its Attorneys and Counsel,

ALEX M. WINSTON,
F. D. ALLEN.

Dated San Francisco, California, January 2, 1923.

So ordered:

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. 3957. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jan. 2, 1923. F. D. Monckton, Clerk.